No. 88-1278

Supreme Court, U.S.
FILED
MAR 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

CONSOLIDATED TELEVISION CABLE SERVICE, INC., - - - - - Petitioner,

versus

THE CITY OF FRANKFORT, KENTUCKY, ELECTRIC AND WATER PLANT BOARD OF THE CITY OF FRANKFORT, KENTUCKY and COMMUNITY SERVICE, INC., - - Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

JOSEPH E. STOPHER
BOEHL STOPHER GRAVES & DEINDOERFER
Suite 2300
One Riverfront Plaza
Louisville, KY 40202
(502) 589-5980
Counsel of Record

RAYMOND G. SMITH
EDWARD H. STOPHER
BOEHL STOPHER GRAVES & DEINDOERFER
Suite 2300
One Riverfront Plaza
Louisville, KY 40202
(502) 589-5980
Counsel for Petitioner

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

13pp

TABLE OF CONTENTS

PAGE

I. **The Sixth Circuit has Dramatically Changed the Test for State Action Immunity by Allowing State Courts to Create Their Own Divergent Standards, Binding on Federal Courts, as to What Constitutes a "Clearly Articulated and Affirmatively Expressed" State Policy, and By Eliminating the Requirement That Municipalities Must Act "Pursuant To" the Declared State Policy to be Entitled to Immunity.** 1– 6

II. **The Sixth Circuit's New Test for Res Judicata Bars Recovery for a 1982 Civil Rights Violation Because It Was Not Asserted in Previous Litigation Arising Out of Conduct in 1960 and 1971** ... 6– 7

CONCLUSION 8– 9

TABLE OF AUTHORITIES

Cases: PAGE

324 Liquor Corporation v. *Duffy*, 479 U.S. 335 (1987) 2, 3

Cantor v. *Detroit Edison Company*, 428 U.S. 579 (1976) 4

City of Lafayette, Louisiana v. *Louisiana Power & Light Company*, 435 U.S. 389 (1978) 5

Community Communications Company, Inc. v. *City of Boulder, Colorado*, 455 U.S. 40, 54 (1982)... 2– 3

Consolidated Television Cable Service, Inc. v. *City of Frankfort, Kentucky*, 857 F. 2d 354, 356 (6th Cir. 1988) 7

Goldfarb v. *Virginia State Bar*, 421 U.S. 773 (1975) 4

Hanover Shoe Inc. v. *United Shoe Machinery Corporation*, 392 U.S. 481 (1968) 7

Hoover v. *Ronwin*, 466 U.S. 558 (1984) 2

Lawlor v. *National Screen Services Corp.*, 349 U.S. 322 (1955) 7

Parker v. *Brown*, 317 U.S. 341 (1943) 2, 3

Southern Motor Carriers Rate Conference, Inc. v. *United States*, 471 U.S. 48 (1985) 5

Town of Hallie v. *City of Eau Claire*, 471 U.S. 34 (1985) 2, 4

Zenith Radio Corporation v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971) 7

Statutes:

KRS 96.010 ..... 1, 4, 6

No. 88-1278

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

CONSOLIDATED TELEVISION CABLE SERVICE, INC. - - - - - *Petitioner*

v.

THE CITY OF FRANKFORT, KENTUCKY, ELECTRIC AND WATER PLANT BOARD OF THE CITY OF FRANKFORT, KENTUCKY AND COMMUNITY SERVICE, INC. - - - *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

I. The Sixth Circuit has Dramatically Changed the Test for State Action Immunity by Allowing State Courts to Create Their Own Divergent Standards, Binding on Federal Courts, as to What Constitutes a "Clearly Articulated and Affirmatively Expressed" State Policy, and By Eliminating the Requirement That Municipalities Must Act "Pursuant To" the Declared State Policy to be Entitled to Immunity.

Respondents acknowledge that KRS 96.010 alone does not constitute a "clearly articulated and affirmatively expressed" state policy authorizing municipal

regulation or ownership of cable television.[1] *Town of Hallie* v. *City of Eau Claire,* 471 U.S. 34 (1985). They nevertheless urge this Court to deny certiorari, and by its denial affirm the Sixth Circuit's published opinion which grants state courts the same power as state legislatures to declare what municipal activities are immune from the Sherman Act. This Court has never approved such an interpretation of state action immunity. Adoption of Respondents' position would nullify the exclusive federal role in enforcing the uniform national policy of competition. Denial of this Petition will result in every municipality and municipal affiliate being automatically immune from the Sherman Act. It will permit 50 state courts to create 50 divergent state standards as to what constitutes a "clearly articulated and affirmatively expressed" state policy.

Except when a state court acts in its legislative capacity, state action immunity arises solely from the acts of a state legislature. *Hoover* v. *Ronwin,* 466 U.S. 558 (1984); *324 Liquor Corporation* v. *Duffy,* 479 U.S. 335 (1987). Contrary to respondents' brief, that principle is the heart of *Parker* v. *Brown,* 317 U.S. 341 (1943). The diffierence between the respective roles of a state legislature and a state court construing state law is fundamental to a proper application of state action immunity.

The United States is not a nation of "City-states," nor of state courts. It is a nation of states. *Com-*

[1]The named parties are the only parties to this litigation. Petitioner, Consolidated Television Cable Service, Inc., has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

munity Communications Company, Inc. v. *City of Boulder, Colorado,* 455 U.S. 40, 54 (1982). State courts do not enact laws or create a state's policy, that is solely a function of a state legislature. It is therefore only "activities directed by [a state] legislature" which the Sherman Act does not restrain. *Parker,* 351. All other conduct, whether of a municipality or a state court, is subject to the proscriptions of the Sherman Act. Indeed, this Court has repeatedly stated that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *324 Liquor Corporation,* at 343 .

By denying this Petition, the Sixth Circuit's opinion will stand for the proposition that state courts are the final arbiter of what constitutes a "clearly articulated and affirmatively expressed" state policy for antitrust purposes. Such a ruling ignores that the Sherman Act is a federal law, not a state law. It would erect an impenetrable barrier to anticompetitive municipal conduct by allowing 50 state courts to impose their own views as to whether municipal conduct should be immune under the guise of what they consider to be "clearly articulated and affirmatively expressed." The uniformity embodied in the Sherman Act would be all but destroyed. There is not a state in the nation which does not have some law which could shield every claim of illegal municipal conduct behind the cloak of a state court declaration that the challenged conduct is lawful under state law. This Court has never recog-

nized a state court interpretation of state law as being conclusive of a "clearly articulated and affirmatively expressed" state policy. *Town of Hallie,* at 448, n.8; *Community Communications Company, Inc.,* at 52, n.15.

In every state action immunity case decided by this Court, the threshold issue has been whether a state legislature has addressed the particular subject whose regulation is alleged to violate the antitrust laws. An "affirmative addressing" of the particular subject being regulated has been indispensable to a finding of state action immunity.

> *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975)—no immunity because the Supreme Court of Virginia had not approved minimum fee schedules;
>
> *Cantor* v. *Detroit Edison Company,* 428 U.S. 579 (1976)—pervasive regulation of public utilities but no specific regulation as to the distribution of light bulbs, no immunity;
>
> *Community Communications Company, Inc.*—no immunity because the Colorado legislature had never addressed the regulation of cable television;
>
> *Town of Hallie*—immunity because the Wisconsin state legislature had addressed waste treatment.

By Respondents' own admission, KRS 96.010 does not meet the standard of "clearly articulated and affirmatively expressed state policy" without resort to state court interpretation. The same, of course, can be said of numerous state statutes which exist in every

state. The fact that KRS 96.010 must be "construed" by a state court before a federal court can declare that the statute evidences a "clearly articulated and affirmatively expressed" state policy alone undermines the Sixth Circuit's application of state action immunity. State action immunity is not predicated on what a state legislature could have done, or whether certain conduct is lawful under state law, but rather on what the legislature itself "clearly articulated and affirmatively expressed." The Sixth Circuit's opinion opens a gaping "chink" in the armor of antitrust law.

Nor can Respondents' contention be accepted that municipalities may ignore a legislative state policy and still claim that they, or their municipal affiliates, acted "pursuant to " the state policy. Such a proposition nullifies the directive of this Court that cities must act "pursuant to" the legislative command in order to partake of state action immunity. *Southern Motor Carriers Rate Conference, Inc.* v. *United States,* 471 U.S. 48(1985); *City of Lafayette, Louisiana* v. *Louisiana Power & Light Company,* 435 U.S. 389 (1978).

The federal requirement that cities act "pursuant to" state policy is too important to be left to the parochial interests of state courts. Elected judges, just like elected city officials, can't help but being squeamish at the prospect of ruling that a city has exceeded its powers, particularly when such a ruling has federal antitrust ramifications. As Respondents point out, Kentucky's highest court has held that it is lawful under state law for the Plant Board to dis-

criminate against Consolidated in providing a non-traditional governmental service such as cable television. (Brief, City of Frankfort, p. 5). That is one reason why exclusive jurisdiction over antitrust claims must reside with federal courts.

Nor does this case raise the specter of federal courts being required to review every detail as to how a municipality carries out the declared state policy. There is no "subjective motivation" element to Consolidated's claim. Respondents do not deny that the City has never sought to "own" or "operate" its own cable system as required by the statute upon which they predicate their immunity. KRS 96.010. Respondents do not deny that the City has never approved the Plant Board's relationship with Community. Indeed, Community was formed not because the Plant Board found it "impracticable" to operate a cable system. Community was formed because there exists "no statutory authority for the Plant Board directly to operate a cable system." It is the City's failure to take any action remotely required by KRS 96.010 which undermines the City's entitlement to immunity.

II. The Sixth Circuit's New Test for Res Judicata Bars Recovery for a 1982 Civil Rights Violation Because It Was Not Asserted in Previous Litigation Arising Out of Conduct in 1960 and 1971.

Contrary to Respondents' brief, the Sixth Circuit did not rule that Consolidated's Civil Rights claims were barred by collateral estoppel. The Sixth Circuit affirmed the District Court's dismissal solely "on

grounds of res judicata rather than on grounds of collateral estoppel." *Consolidated Television Cable Service, Inc.* v. *City of Frankfort, Kentucky*, 857 F. 2d 354, 356 (6th Cir. 1988).

More importantly, Respondents attempt to transform the Sixth Circuit's res judicata holding into a statute of limitation defense in order to avoid the patent conflict with this Court's decisions in *Lawlor* v. *National Screen Services Corp.*, 349 U.S. 322 (1955); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corporation*, 392 U.S. 481 (1968); and *Zenith Radio Corporation* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971). That Respondents may have engaged in similar Civil Rights violations over a thirty year period is irrelevant. The District Court did not rule that Consolidated's claims were barred by any statute of limitation. (Appendix B, p. 29a).

Consolidated's present suit arose out of Respondents conduct in 1982, not Respondents conduct in 1960 or 1971. Those previous suits cannot bar a claim which accrued in 1982 and in which the present Civil Rights claims were never asserted. *Lawlor; Hanover Shoe, Inc.; Zenith Radio Corporation.* Any other conclusion would forever bar repeated instances of unlawful conduct which are not subject to a statute of limitation defense. There is no denying that the Sixth Circuit's opinion is directly in conflict with decisions of this Court.

CONCLUSION

The Sixth Circuit's opinion drastically alters the test repeatedly employed by this Court to determine municipal immunity from the antitrust laws. Indeed, it creates municipal immunity by state judicial fiat. In place of a uniform national standard, it creates 50 divergent state court standards as to what is or is not a "clearly articulated and affirmatively expressed" state policy. Denial of this Petition will authorize every state court to substitute its view of what the Sherman Act should prohibit in place of what the Sherman Act does prohibit.

Consolidated and Community are engaged in purely commercial activity. Community, just like Consolidated, cannot survive without being profitable. This Court should not allow the Sixth Circuit to condemn Consolidated and all others who compete with municipalities or their affiliates to extinction by placing such a gauzy cloak of state involvement over what is unregulated conduct. Petitioner respectfully requests this Court to grant its Petition and review the Opinion of the Sixth Circuit.

Respectfully submitted,

JOSEPH E. STOPHER
BOEHL STOPHER GRAVES & DEINDOERFER
Suite 2300
One Riverfront Plaza
Louisville, KY 40202
(502) 589-5980
Counsel of Record

RAYMOND G. SMITH
EDWARD H. STOPHER
BOEHL STOPHER GRAVES & DEINDOERFER
Suite 2300
One Riverfront Plaza
Louisville, KY 40202
(502) 589-5980

Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Joseph E. Stopher, a member of the Bar of this Court, hereby certify that on this ____ day of March, 1989, three copies of Petitioner's Reply Brief in the above-entitled case were mailed, first class postage prepaid, to Mr. Sheryl G. Snyder and Ms. Virginia Snell, WYATT, TARRANT & COMBS, 2800 Citizens Plaza, Louisville, Kentucky 40202; Mr. Allen Prewitt, PREWITT & PREWITT, 311 Wilkinson Street, Frankfort, Kentucky 40602; Mr. Charles L. Hobson, 222 West Main Street, Frankfort, Kentucky 40601; counsel for all Respondents herein. I further certify that all parties required to be served have been served.